No. 14083.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JESUS ELIZARRARAZ,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the United States,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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Statement of Pleadings and Facts Disclosing Jurisdiction.

Petition for Declaration of United States Nationality under Section 503 of the Nationality Act of 1940 (8 U. S. C. A. 903), was filed in the United States District Court, Southern District of California on September 8, 1952 [Tr. of R. p. 5].

The answer denied the material allegations of the Petition and raised the affirmative defense that appellant had been expatriated under Section 401(d) of the Nationality Act of 1940 [Tr. of R. p. 6].

Jurisdiction is conferred on the United States District Court from these premises and Title 28, U. S. C. A. 2201.

Judgment was entered in favor of the Appellee and against the appellant August 11, 1953 [Tr. of R. p. 45], and Notice of Appeal duly served and filed September 10, 1953.

Appeal from District Court to Circuit Court is permitted under 28 U. S. C. A. 1291.

Statement of the Case and Facts.

Appellant was born in the United States in 1912, of Mexican parents. In 1932, appellant went to Mexico with his parents and on April 1, 1943, during time Mexico was at War, joined the Police Force of Mexico City, attached to the Special Services Division. His service terminated in 1947; said service occurring *only* during the time that Mexico was at War.

The appellant returned to the United States in 1948.

The Immigration and Naturalization Service instituted deportation proceedings against appellant. This present action was instituted to establish the fact that appellant is a National of the United States.

The appellee pleaded the affirmative defense that the appellant had become expatriated under Section 401(d) of the Nationality Act of 1940 in that he had accepted employment in the Police Force of Mexico City, alleging that said employment was available only to Nationals of Mexico. To sustain this defense, the appellee cites the Mexican Constitution, Article 32, which provides that only Nationals of Mexico should be employed on the Police Force *in time of peace.*

No pledge of allegiance was ever made by appellant to the Republic or Country of Mexico.

The principal issue is whether or not the evidence justifies Finding VII and Conclusion III of the Findings of

Fact and Conclusions of Law [Tr. of R. p. 43]. More specifically, whether or not the appellant was expatriated for being employed by the Police Force of Mexico City during *War time.*

A further issue is presented, whether or not appellant expatriated himself by an involuntary act.

Specification of Error.

The trial court erred in holding that the evidence was sufficient to justify Finding VII of Findings of Fact and Conclusions of Law [Tr. of R. p. 43].

The Court erred in making Conclusion III of Conclusions of Law [Tr. of R. p. 43].

The Court erred in decreeing that the appellant had been expatriated under 401(d) Nationality Act of 1940, 8 U. S. C. 801(d) [Tr. of R. p. 45].

The Court erred in decreeing that a Native born National of the United States can be expatriated involuntarily.

Summary.

Appellant insists that he never, at any time, committed any act of expatriation. His service in the Mexico City Police Force during *War time* was not such as to require Mexican nationality.

Article 32 of the Mexican Constitution, urged by Appellees, restricts employment in the Police Force to Mexico Nationals in time of peace. There is no restriction cited anywhere providing for such a limitation in time of war.

Appellees have failed to prove that such employment was limited to nationals of Mexico, indeed, the record clearly shows, that the authorities in Mexico City had no knowledge of appellant's nationality other than that he was a national of the United States.

ARGUMENT OF THE CASE.

A. Appellant Is a Citizen of the United States by Reason of Birth in the United States.

1. The 14th Amendment to the Constitution of the United States provides that all persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State in which they reside.

United States Constitution, 14th Amendment.

2. In the famous case of *United States v. Wong Kim Ark,* it was held that although the person born in the United States was of dual citizenship, he, nevertheless, was a citizen of the United States.

United States v. Wong Kim Ark, 169 U. S. 649.

B. Appellant Has Not Been Expatriated Under Section 401(d), Nationality Act of 1940 (8 U. S. C. 801(d)).

1. Expatriation results under this section when it is established that the United States citizen accepts employment under a foreign government that is available only to nationals of that government.

a. This section of the law provides as follows:

"A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

(d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible."

Nationality Act of 1940, Sec. 401(d) (8 U. S. C. A. 801(d)).

b. This matter is an affirmative issue which must be proven by the party who urges the same.

The law provides that in proceedings to establish nationality under the Nationality Act of 1940, the burden of proof that the citizen has lost his citizenship or has been expatriated is upon the Government.

The fact must be established as an affirmative defense.

Schioler v. The Secretary of State, 175 F. 2d 402.

The burden of proof is on the Government to prove Loss of Citizenship.

Kawakita v. United States, 343 U. S. 717, 72 S. Ct. 950.

c. American citizenship is such an important right, that the proof to establish expatriation must be of an extremely high order.

Courts have passed on the question concerning the degree of proof necessary for expatriation, and without exception, it has been held that the evidence must be of a high caliber.

The evidence must be "clear, certain and overwhelming."

Nieto v. McGrath, 108 Fed. Supp. 150;

Martinez v. McGrath, 108 Fed. Supp. 155.

The Court stated in *Meyer v. United States* that citizenship shall not be cancelled unless the proof is "clear, certain and indeed overwhelming."

Meyer v. United States, 141 F. 2d 825.

Again, in the case of *Schneiderman v. United States,* the Court held that citizenship can only be revoked by evidence that is "clear, convincing and unequivocal."

> "It cannot be done by a bare preponderance, of evidence which leaves the issue in doubt. . . . Wigmore on Evidence, 3d ed., §2498—and more especially is this true when the rights are so precious!"
>
> *Schneiderman v. United States,* 320 U. S. 118, 63 S. Ct. 1333.

A somewhat similar situation to that which exists in the instant case, was presented in the matter of *Naito v. Acheson* and in *Furuno v. Acheson.* These were American citizens by birth of Japanese parents. Naito was employed in a clerical capacity in the United States Army Supply Depot and later transferred to civilian control under Japanese Government. In effecting this change, it was ordered that such civilian employees would have to be citizens of Japan. The Court held that the evidence was insufficient to result in expatriation and stated as follows:

> "The evidence presented by the defendant (Secretary of State of United States) does not even remotely rise to the level of the exacting *standard of proof* required to deprive a person of citizenship. As the Supreme Court has stated: 'Proof to bring about a loss of citizenship must be clear and unequivocal.' Baumgartner v. U. S., 322 U. S. 665, and Schneiderman v. U. S., 320 U. S. 118."
>
> *Naito v. Acheson,* 106 Fed. Supp. 770.

The companion case involved a native American of Japanese parents who was employed as a mate on a Japanese Ferryboat when an order was signed that his classification called for Japanese nationals to fill such employ-

ment. The Court affirmed the case of *Naito v. Acheson, supra.*

Furuno v. Acheson, 106 Fed. Supp. 775.

The Court's attention is called to the case of *Acheson v. Maenza* which appellant believes is very similar to the instant case. The plaintiff was an American born citizen of Italian parents. He returned to Italy and was conscripted into the Italian Army. The question arose as to whether or not the plaintiff had taken an oath of allegiance. The regulations which the Government relied upon in that case were about as vague and indefinite concerning the Army and the Oath of Allegiance, as were the orders in the instant case concerning the limitations on the employment of police officers in Mexico City during war time.

The Court said:

> "American citizenship is perhaps the most precious right known to man today; it is not easily granted nor should it be lightly taken away. In denaturalization cases, the government has always been held to a strict degree of proof; it is usually required to prove its case by *clear, unequivocal* and convincing evidence, not by a base preponderance which leaves the issue in doubt."
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> *Knauer v. United States,* 328 U. S. 654, 66 S. Ct. 1304, 90 L. Ed. 1500;
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> *Baumgartner v. United States,* 322 U. S. 665, 64 S. Ct. 1240, 88 L. Ed. 1525;
>
> *Schneiderman v. United States,* 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796.
>
> ". . . In this case the government introduced the 1872 Military Regulations of the Italian Army to show that an oath must have been taken by the

plaintiff . . . This did not cure the fatal weakness in the government's case but merely added an element of conjecture and speculation to a field where proof is required. No substantial evidence was forthcoming that the regulations were still in effect when appellee complied with them even if they were still applicable. There must be more than inference, hypothesis or surmise before a natural-born citizen of the United States can be stripped of his rights and privileges of citizenship and be adjudicated an expatriate."

Acheson v. Maenza, 202 F. 2d 453.

C. Citizens and Nationals of the United States by Birth Cannot Be Expatriated Except Voluntarily.

In the early case of *United States v. Wong Kim Ark,* the Court said:

"The 14th Amendment, while it leaves the power where it was before, in Congress to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship."

United States v. Wong Kim Ark, supra.

In the later case of *Perkins v. Elg,* the Court considered a matter involving a native born American of dual citizenship and stated that such citizenship could not be lost except by voluntary renunciation.

". . . persons born within the United States and subject to its jurisdiction become citizens of the United States. To cause a loss of that citizenship in the absence of treaty or statute having that effect, there must be voluntary action."

Perkins v. Elg, 307 U. S. 325.

D. Appellee Failed to Produce Evidence of the High Standard Required to Justify the Finding of Fact VII, the Conclusions of Law III, and the Judgment of Expatriation.

1. These Findings and Conclusions are subject to review on appeal. This Circuit Court has the right to review the same.

Baumgartner v. United States, 322 U. S. 665, 64 S. Ct. 1240.

2. The only evidence to sustain the Judgment of expatriation was a dubious inference that the law of Mexico which prevailed in peace time was continued over into war time without any specific reference to a fact or regulation so providing [Tr. of R. p. 38]. We submit that the wording of Section 32 of the Mexican Constitution relied upon by Appellees *restricts* the nationality requirement for service in the Mexican Police Force to *times of peace.*

3. The burden of proof is on the appellee to prove this issue.

Schioler v. Secretary of State (*supra*).

4. This proof must be clear, unequivocal, convincing and overwhelming.

5. The evidence established that the appellant was employed on the Police Force of Mexico City during war time [Tr. of R. pp. 9-10]. The Mexican Constitution and law provided that *"during time of peace"* only nationals of Mexico were employable as Police Officers. Article 32, Mexican Constitution [Tr. of R. p. 13]. All of the regulations promulgated thereunder and referred to in the Exhibits and Stipulations were made at a time when Mexico was at peace [Tr. of R. p. 15]. By Stipula-

tion, it was agreed that Mexico declared war on May 22, 1942 [Tr. of R. p. 10], and the regulations introduced by appellee were dated November 12, 1941, or earlier [Tr. of R. p. 15].

6. The facts indicate a strong inference that the Mexican Government made no requirement of nationality as a prerequisite to employment on this Police Force in Mexico City during a time of war [Tr. of R. p. 38]. The appellant was attached to the "Special Services" Department of the Police Force and appellee's witness, William S. Stern, testified that, even in time of peace, the requirement of Mexican Nationality could have been waived [Tr. of R. p. 38]. He also testified that he does not know if it was waived or not [Tr. of R. p. 39]. In his application for the position, the appellant listed his place of birth as Los Angeles, California, thus establishing the fact that he was a national of the United States [Tr. of R. p. 20]. In none of the documents on file with the Mexico City Police Force is there any reference to the fact that the appellant is a national of Mexico [Tr. of R. pp. 20-31]. The nationality of appellant's parents was never disclosed to the Mexican authorities, nor did the appellant ever take an Oath of Allegiance to the Mexican Government [Tr. of R. p. 49]. If Mexican Nationality was an indispensable prerequisite to employment on the Mexico City Police Force, where is the evidence that appellant's Mexican Nationality was made known to the authorities at the time of his employment on said Police Force. Appellant knows of no law nor regulation limiting employment in the Mexico City Police Force to Nationals of Mexico in *time of war,* and no law nor regulation to such effect was introduced in evidence.

In brief, the Appellee had the burden to prove that appellant was expatriated because he accepted employment in the Mexico City Police Force which employment was available only to Nationals of Mexico.

The proof failed. The employment was so limited in time of peace. Appellant's employment occurred in time of war and no evidence was introduced by Appellee establishing that such employment was limited to Nationals in time of war. Indeed, it must be inferred that if the law of Mexico *limited* such employment in time of peace, by using words of limitations, the opposite would be true in time of war, permitting employment in the police force in time of War to anyone *without limitation* who would assist in the defense of the Patria—Mexico.

It is respectfully requested that the decree and judgment of the District Court be reversed, and that this Court decree that Appellant is a citizen of the United States and has not been expatriated.

Respectfully submitted,

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Jacque Boyle,
Attorneys for Appellant.